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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 937

DIANA K. POWELL, *Petitioner*

v.

THE WASHINGTON POST COMPANY, and JAMES P. MITCHELL, Secretary of Labor for the United States, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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DIANA K. POWELL, *Petitioner*

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THE WASHINGTON POST COMPANY, and JAMES P. MITCHELL, Secretary of Labor for the United States, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on April 23, 1959.

OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the District of Columbia, entered October 1, 1958, is unofficially reported at 35 CCH Lab. Cas. ¶71,833; 27 LW 2197, and is set forth in the Appendix hereto at page 1a. The Opinion of the United States Court of Appeals for the District of Columbia Circuit, entered April 23, 1959, is reported at 87 WLR 423 (April 27, 1959), and is set forth in the Appendix hereto at page 4a.

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit sought to be reviewed was entered on April 23, 1959, and is set forth in the Appendix hereto at page 6a.

The jurisdiction of this Court is invoked under the Revised Judicial Code, 28 U.S.C.A. 1254(1), providing for review of a judgment of a United States Court of Appeals by writ of certiorari granted upon the petition of a party to the case.

QUESTIONS PRESENTED

The question presented is whether an employee wrongfully discharged for reporting overtime violations of the Fair Labor Standards Act of 1938, as amended, to the Wage and Hour Administrator, may bring an action in her own name for injunctive relief under Section 15(a)(3) of the Act, declaring such discharge unlawful, if pursuant to Rule 19(a) of the Federal Rules of Civil Procedure, providing for joinder of necessary parties, the Secretary of Labor was joined as a defendant, and has submitted to the jurisdiction of the Court by filing an Answer. An

alternative question is presented as to whether mandamus or a mandatory injunction will issue to join the Secretary of Labor as an involuntary plaintiff under Rule 19(a) *supra*, solely for procedural purposes, upon a showing of arbitrary and capricious evasion of duty in declining to act upon admitted evidence of a prima facie case.

STATUTES AND REGULATIONS INVOLVED.

The pertinent statutes are:

Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. 201 *et seq.*, 52 Stat. 1060; as amended by 53 Stat. 1266; by Reorganization Plan No. 2 (60 Stat. 1095) effective July 16, 1946; . . . by the Fair Labor Standards Amendments of 1949 (63 Stat. 917); by Reorganization Plan No. 6 of 1950 (64 Stat. 1263); by the Fair Labor Standards Amendments of 1955 (69 Stat. 711):

Investigations, Inspections, Records, and Homework Regulations

Sec. 11(a) The Secretary of Labor or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act . . . Except as provided in section 12 and in subsection (b) of this section, the Secretary shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Secretary shall bring all actions under section 17 to restrain violations of this Act.

. . .

Prohibited Acts

Sec. 15(a) . . . it shall be unlawful for any person—

. . .

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this act, or has testified or is about to testify in any such proceeding . . .

. . .

Injunction Proceedings

Sec. 17. The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided,* That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

The pertinent Rules are:

Revised Rules of the Supreme Court of the United States effective July 1, 1954:

Rule 19. Considerations Governing Review on Certiorari

1. (b) Where a court of appeals has . . . decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court . . .

Federal Rules of Civil Procedure for the United States District Courts, with amendments to August 1, 1957:

Rule 19(a). Necessary Joinder

Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

STATEMENT OF THE CASE

Civil action was brought by petitioner in the United States District Court for the District of Columbia for reinstatement to employment with the Washington Post Company under the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1068, 29 U.S.C.A. Sec. 201 *et seq.*, for discharge in violation of Section 15(a)(3) of the Act. (p. 3). The facts averred in the Complaint, which must be admitted for consideration of dismissal or summary judgment, are set forth in greater detail in the Record, in the Complaint (R-JA-2) and plaintiff's affidavit (R-JA 13).

The Secretary of Labor was joined for procedural purposes under Rule 19(a) of the Federal Rules of Civil Procedure. (p. 5). The United States District Court granted the Washington Post Company's Motion to Dismiss and the Motion of the Secretary of Labor for Summary Judgment, and denied plaintiff's motions, by order entered October 21, 1958. (App. 1a, 3a).

The judgment of the District Court was affirmed on appeal by the United States Court of Appeals for the District of Columbia Circuit (No. 14823), decided April 23, 1959. (App. 4a, 6a).

The grounds stated for the decision were that injunction actions under Section 17 of the Fair Labor Standards Act (p. 4) are reserved exclusively to the Secretary of Labor, that his discretion is absolute, even in the face of evidence that it is exercised in an arbitrary and capricious manner, and that under the statute employees are without recourse for violations other than unpaid minimum wage and overtime compensation.

ARGUMENT FOR GRANTING THE WRIT

I.

The Court Below Has Decided an Important Question of the Interpretation of the Fair Labor Standards Act Which Has Not Been Settled by This Court.

During oral argument (unreported) in the United States Court of Appeals for the District of Columbia Circuit, questioning by the Court clearly established the positions of the appellees to be that the Secretary of Labor was empowered by Section 11(a) of the Fair Labor Standards Act (p. 3) to make arbitrary and capricious decisions totally unfounded in fact or reason, and that no procedure is available to an employee to seek recourse in the courts to procure the enforcement of the law.

Petitioner contends that no such power may be inferred from the wording of the Act. The clear meaning of the controversial clause in Section 11(a) is that it relates to actions in discovery, inspection and production of records, which are properly limited to the Secretary of Labor to protect confidential material from unreasonable search. Insofar as the restriction relates to this type of action, it is logical. The intent is clear from the exceptions cited in the clause, which

provide other means of discovery to investigations through State agencies and under the Child Labor provisions.

The essential purpose of the Fair Labor Standards Act is the protection of the rights of employees. Authority vested in the Secretary of Labor to enforce the Act is a public trust to effect that purpose. It presupposes the interest of the Secretary is in protection of the employee, and his authority is predicated upon that interest. Further, Rule 17(a) of the Federal Rules of Civil Procedure provides:

> Every action shall be prosecuted in the name of the real party in interest . . . a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

The rule was not intended to defeat the purposes of a law by barring the beneficiary from legal remedies. In the hearings before the Committee on Education and Labor, House of Representatives, 21st Congress, First Session, on HR 2033, Volume 1, pp. 114-115, on the Amendments to the Fair Labor Standards Act William R. McComb, Wage and Hour Administrator; testified

> . . . I would like to make a statement, because it has not been questioned, and I think something should be said. That is the request here for the right of the Secretary to sue. We have had many employees to ask us to sue. They are reluctant, as we all are, unless we are lawyers, to get into Court. They do not want to go in—they do not

want to get involved. They say: "Why don't you sue for me?"

In *A.T.A.* v. *U.S.*, 60 S. Ct. 1059, 84 L. Ed. 1345, 310 U.S. 534 at 542, Mr. Justice Reed, in stating the relative powers of the Interstate Commerce Commission and of the Wage and Hour Division of the Department of Labor over the question presented by that case ruled:

> In the interpretation of statutes, the function of the Courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. Minor v. Mechanics Bank, 1 Peters 46, 64; Pennington v. Coxe, 2 Cranch 33, 59; James v. Milwaukee, 16 Wall 159, 161; Atkins v. Disintegrating Co., 18 Wall 272, 301. White v. U.S., 191 U.S. 545. Oxawa v. U.S., 260 U.S. 178, 194; U.S. v. Stone & Downer Co., 274 U.S. 225, 239; Gulf State Steel Co. v. U.S., 287 U.S. 32, 45; Royal Indemnity Co. v. American Bond & M. Co., 289 U.S. 165, 169; Lincoln v. Ricketts, 297 U.S. 373, 376; Foster v. U.S. 303 U.S. 118, 120.

It would be distortion of the plain meaning and purpose of the Fair Labor Standards Act to lift a single phrase from Section 11(a) (p. 3) and transpose it several pages away and out of context to read as though it were part of Section 17. Yet this was what was done in the Third Circuit in 1943 in the case of *Bowe* v. *Judson C. Burns*, 137 F. 2d 37, and in the Second Circuit in *Roberg* v. *Henry Phipps Estate*, 156 F. 2d 958, in 1946, which have been cited ever since as precedent that employers can flaunt the provisions of Section 15(a)(3) with impunity.

The occasional victim of unlawful discharge is almost always a person unskilled in the technical in-

tricacies of legislative interpretation and judicial decision, and so is helpless in the face of adverse decisions. Further, the infrequency of this violation as compared to the more fully defined minimum wage and overtime provisions of the Act tends to abandonment of these cases when confronted by opposition and lack of cooperation from the Labor Department.

The Secretary of Labor has himself exercised the authority in a closely parallel case, *Mitchell* v. *Equitable Insurance Company*, 13 W.H. Cases 564. A favorable decision was rendered for the Secretary in an action for reinstatement of an employee wrongfully discharged in violation of Section 15(a)(3) of the Fair Labor Standards Act in the District Court of Camden, New Jersey, in an opinion which stated:

> The interpretation that counsel would ask the court to place upon the Act would be that if the employees would tell the administrator the truth in the investigation, even though the company is not subsequently found to be engaged in interstate commerce, just because they have cooperated with an agency of the government, and for that alone, the employer can fire them.
>
> Congress has seen fit to adopt wording in this Act that has been described by the court of appeals in this circuit in the Judson C. Burns case, 157 F. 2d 37, as being clear and explicit. The Act says "any employee". It specifically does not extend the protection of this Act to employees covered under the Act. It prevents the discharge or discrimination by any employer against any employee who has testified or is about to testify. . . .
>
> These provisions of the Act, Sections 6 and 7, relating to wages and to hours, do apply only to employees. The prohibition expressed in Section 15, however, are applicable "to any person". See-

> tion 15(a)(3) [the very one we are dealing with here] makes it unlawful for "any person", an employer, to discharge an employee, and for "any person", "whether or not he is an employer, to discriminate against an employee," and so on.
>
> It would seem to the Court that it is well within the legal ability of Congress to provide that no one can discriminate against any employee or any person because they have given a statement to a federal agency in the realm of something that the federal agency is entitled to investigate, regardless of the outcome of the investigation.
>
> . . . I conclude as a matter of law that the Court has authority to order her reinstatement together with back pay to which she is entitled under the Act.

The Secretary of Labor can not logically reverse his own positions in this case, upheld by a decision of the Court.

Section 17 provides for actions for injunctions without specifying either the parties or the sections of the Act to which it applies, as does Section 16, but designating the District Courts as the proper forum. 29 U.S.C.A. 217. (p. 4) Section 17, like Section 16, specifies waiver of liquidated damages in actions brought by the Secretary.

No decision of this Court has been cited as authority that Section 11(a) restricts the equitable remedy of injunction to the Secretary. Two decisions of this Court cited in the briefs and arguments in the courts below define the remedies available under the Fair Labor Standards Act, but do not cite the phrase in Section 11(a) as a limitation on the injunctive remedy. *Robertson* v. *Argus Hosiery Mills*, 121 Fed. 2d 285

(1941), 62 S. Ct. 181, 314 U.S. 681, 86 L. Ed. 544; *Mitchell* v. *Lublin, McGaughy & Associates, et al.*, 79 S. Ct. 260. But perhaps the most convincing authority are the numerous actions that have been brought by employers to restrain enforcement of the Act, on the ground of exemption, in which no claim under the phrase in Section 11(a) was made as a defense. In the cases of *Rogers* v. *B & B Vending Co.*, 250 Fed. 2d. 120 (5th Cir. 1957) and *Rogers* v. *Skinner*, 201 Fed. 2d 521 (5th Cir. 1953), the actions were dismissed, not because Section 11(a) excludes actions not brought by the Secretary, but because the Secretary had not been made a party. In the instant case the Secretary was joined under Rule 19(a).

II.

The Court Below Has So Far Departed From Established Procedures in Granting Dismissal and Summary Judgment Without Opportunity to Submit Evidence as to the Averments of the Complaint as to Justify Reversal by This Court.

Petitioner respectfully submits that the logic of the opinion of the Court below is defective in several particulars.

In reciting the underlying facts, the Court has failed to evaluate the evidential worth of the affidavits. The affidavit of Mr. Hennessey, the investigator (R-JA 12) shows only that he investigated wage and hour violations as to the petitioner, but does not show that he did discover wage and hour violations by other employees, a point significant for the purpose of this action insofar as it rebuts the inference that petitioner's complaints were made frivolously and in bad faith. It disregards both the averments of the Complaint (R-JA 2) and plaintiff's affidavit (R-JA 13).

The investigator's affidavit, upon which the Court below relies, accepts without scrutiny the Washington Post Company's allegation that petitioner's employment was terminated as a result of abolition of her job. The Court below disregards plaintiff's affidavit referring to numerous documents admitted as genuine in the original file showing circumstantial evidence clearly supporting the Complaint.

It seems significant to petitioner that it is well settled law that upon motion for dismissal or for summary judgment all the allegations of the complaint must be admitted as stated, and that all questions of fact must be resolved in the plaintiff's favor. This rule has been clearly and logically stated by this Court in *U. S.* v. *Employing Plasters' Association of Chicago*, 74 S. Ct. 452, 347 U.S. 186, at 189, L. Ed. 618 (1954):

> . . . And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified.

Similarly, the earlier cases of *Asher* v. *Ruppa*, 173 F. 2d 10 (7 Cir. 1949), at 12, quoting numerous precedents, held:

> . . . upon a motion of this sort the complaint must be construed most favorably to the plaintiff, with doubts resolved in his favor and the allegations accepted as true. The complaint should not be dismissed if it can reasonably be conceived that the plaintiff may be entitled to some relief.

In the decision in *Patrick* v. *Esso Oil Company*, U.S. Dist. Ct. N. J., decided November 1, 1957, 156 F. Supp. 336, in which an action was brought for discharge of an employee, the Court stated:

> A complaint is not subject to dismissal unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.

Other cases to the same effect include *Carroll* v. *Morrison Hotel Corp.*, 149 F. 2d 404, 408 (7 Cir. 1945); *Young* v. *Hicks*, 250 F. 2d 80.

The fact that the Court below was mislead by the ambiguity of the affidavit of the investigator indicates the necessity of a trial on the merits, with the opportunity for cross-examination to adduce evidence evaded by respondents.

III.

The Decision of the Court Below is in Conflict With Pertinent Decisions of This Court in Refusing to Issue Mandamus or a Mandatory Injunction to the Secretary of Labor Upon Showing of Arbitrary and Capricious Evasion of a Procedural Duty.

It seems quite evident that the duties and powers delegated to the Secretary of Labor under the Fair Labor Standards Act are statutory obligations that may not be capriciously avoided at the whim of a subordinate or arbitrarily set aside without due consideration in good faith of the merits of the case. Immunity of the Government from suits without its consent is immunity of the authority inherent in the office, not of the human errors and miscarriages of administration. The question whether mandamus would issue to a cabinet officer was settled by this Court as far back as Chief Justice Marshall's time in *Marbury* v. *Madison*, 1 Cranch 137:

> Where the matter is peradventure clear, where the agency is clearly derelict in failing to act, where

the inaction or action turns on a mistake of law, then judicial relief is often available.

It is contended that appellant seeks to compel the exercise of discretion vested solely in the Secretary. But the Secretary is not instituting the suit. He is merely joined as a necessary and interested, but inactive party. It remains in his discretion to decide whether he will give the plaintiff positive assistance, as he has made a gesture of doing by making the investigation. He may, in his discretion, remain inactive, leaving the whole burden of proof upon appellant.

The Secretary of Labor has in effect consented to joinder under Rule 19(a) of the Federal Rules of Civil Precedure (p. 5). The Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Join the Secretary, filed August 11, 1958, on page one, states:

> James P. Mitchell, Secretary of Labor, is already named as a defendant in this action by the plaintiff, and the jurisdiction of this Court over his person is not contested. Service of process has been made upon him. To have him also become a plaintiff herein would put him in what would be at best an anomalous situation.
>
> . . .
>
> Since James P. Mitchell is already a party to the action, there is no need for the action sought by the present motion. The provision of Rule 19(a) respecting an involuntary plaintiff exists for the purpose of allowing a person to be made a party whose presence is necessary if the rights of those already parties are to be fully adjudicated, and who can not be made a party defendant due to lack of the Court's jurisdiction over his person.

Since the Secretary, by his own statement, acknowledges joinder as defendant to be sufficient, for the purposes of Rule 19(a), and admits that it is not contested, it can not be logically stated that it is a suit against the Secretary as an agent of the Government without its consent.

But if joinder of the Secretary of Labor under Rule 19(a) is held not to give effect to the right to enforcement of the Fair Labor Standards Act, then petitioner is entitled to seek the assistance of the Courts through mandamus or a mandatory injunction, for the purely ministerial duty of permitting the Secretary's name to be joined for procedural purposes, so that the legislative policy may not be thwarted. See *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945); *Chapman, Secretary of the Interior* v. *El Paso Natural Gas Co.*, 204 Fed. 2d at 46; *Chapman, Secretary of the Interior, et al.* v. *Santa Fe Pacific Railroad Co. et al.*; U.S. Ct. App. D.C. Cir. 1952, 72 S. Ct. 1036.

CONCLUSION

WHEREFORE, it is respectfully submitted that petition for writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit should be granted.

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APPENDIX

(Filed October 1, 1958)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1351-58

DIANA K. POWELL, *Plaintiff*

v.

THE WASHINGTON POST COMPANY and

JAMES P. MITCHELL, Secretary of Labor for the United States, *Defendants*

Memorandum

The plaintiff, Diana K. Powell, was employed by the defendant, The Washington Post Company, as a part-time clerk until April 1958. In her complaint she alleged that The Washington Post Company discriminated against her and discharged her, in violation of Section 15(a)(3) of the Fair Labor Standards Act, 29 U.S.C.A. 215. She demands that The Washington Post Company reinstate her in adequate and suitable employment and to pay her such compensation from the time unemployed as this Court may deem just and proper.

Section 15(a) of the Fair Labor Standards Act provides that:

> "It shall be unlawful for any person * * * to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to his Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."

A willful violation of this Section subjects the offender to a criminal penalty under Section 16(a) of the Act. Jurisdiction to restrain violations of Section 15 is con-

ferred upon the District Courts by Section 17 of the Act. This Section reads as follows:

> "The district courts • • • shall have jurisdiction, for cause shown, to restrain violations of section 15: Provided, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

Section 11(a) of the Act provides, in part, as follows:

> "Except as provided in Section 12, the Administrator shall bring all actions under Section 17 to restrain violations of this Act."

The authority of the Administrator was transferred to the Secretary of Labor in May 1950 under their Reorganization Plan No. 6. In this case the Secretary of Labor has not brought such an action. There is no language in the Statute which can be construed as compelling the Secretary of Labor to file suit whenever an allegation of a violation is received by the Department. The authority of the Secretary of Labor is exclusive and this Court has no jurisdiction of a suit brought by an employee who alleges that such was discriminately discharged in violation of Section 15(a)(3) and demands reinstatement. The Fair Labor Standards Act makes no provision for a civil action by an employee allegedly discriminately discharged in violation of Section 15(a)(3) of the Act to recover damages for such discharge. For these reasons the motion of the Washington Post Company to dismiss the action for lack of jurisdiction is granted and the motion for summary judgment for the plaintiff is denied; the motion to join James P. Mitchell, Secretary of Labor, as an involuntary plaintiff and for judgment on the pleadings is denied; and the motion for summary judgment as to defendant James P. Mitchell is granted. Counsel for the defendants will prepare the proper order.

EDWARD M. CURRAN /s/
Judge

(Filed October 21, 1958)

Order

The defendant, The Washington Post Company, having filed a motion to dismiss as to the defendant, The Washington Post Company, for lack of jurisdiction and failure to state a claim upon which relief can be granted, and the plaintiff, Diana K. Powell, having filed a motion for summary judgment as to defendant, The Washington Post Company, and a motion to join James P. Mitchell, Secretary of Labor, as an involuntary plaintiff and for judgment on the pleadings and the defendant, James P. Mitchell, Secretary of Labor, having filed a motion for summary judgment as to the defendant, James P. Mitchell, Secretary of Labor, and the Court having considered memoranda filed by all parties with respect to such motions and having heard oral argument thereon, it is this 21st day of October, 1958,

ORDERED, that the motion of the defendant, The Washington Post Company, to dismiss as to the defendant, The Washington Post Company, for lack of jurisdiction and for failure to state a claim upon which relief can be granted be and it is hereby granted; that the motion of the plaintiff, Diana K. Powell, for summary judgment as to the defendant, The Washington Post Company, be and it is hereby denied; that the motion of the plaintiff, Diana K. Powell, to join James P. Mitchell, Secretary of Labor, as an involuntary plaintiff and for judgment on the pleadings be and it is hereby denied; and that the motion of James P. Mitchell, Secretary of Labor, for summary judgment as to the defendant, James P. Mitchell, Secretary of Labor, be and it is hereby granted.

EDWARD M. CURRAN /s/.
Judge.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14823

DIANA K. POWELL, APPELLANT

v.

THE WASHINGTON POST COMPANY and JAMES P. MITCHELL, Secretary of Labor, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided April 23, 1959

Miss Diana K. Powell, appellant *pro se*.

Mr. George Blow, with whom *Mr. James C. McKay* was on the brief, for appellee The Washington Post Company.

Mr. Jack Marshall Stark, Assistant United States Attorney, with whom *Mr. Oliver Gasch*, United States Attorney, and *Mr. Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee James P. Mitchell, Secretary of Labor. *Mr. Walter J. Bonner*, Assistant United States Attorney, also entered an appearance for appellee James P. Mitchell, Secretary of Labor.

Before PRETTYMAN, Chief Judge, and FAHY and BURGER, Circuit Judges.

PER CURIAM: This is a civil action brought by our appellant, Diana K. Powell. She alleged she had been employed as a part-time clerk by The Washington Post Company; she several times notified responsible officers of the Company that clerks in its employ were working in violation of the Fair Labor Standards Act; and, when the Company was informed of her intention to submit the matter to the Department of Labor, she was dis-

charged. She alleged this discharge was in violation of Section 15(a)(3) of the Act.[1] She prayed that the Company be required to reinstate her in adequate suitable employment and pay her compensation for the time she was unemployed, that the defendant Secretary of Labor be required to investigate the conditions described in her complaint, and that he take such further action as might be necessary to restrain continued violations of the Act. The Washington Post Company moved to dismiss, and the Secretary filed an answer and a motion for judgment on the pleadings and then a motion for summary judgment. Attached to the latter motion was an affidavit of an official of the Department of Labor, showing he had made an investigation of the operations of the Company and had been unable to find any evidence of violation of the statute. An affidavit filed by the plaintiff verified the fact that such an investigation had been made. The District Court dismissed as to The Washington Post Company and granted the Secretary's motion for summary judgment.

Section 11(a) of the Fair Labor Standards Act[2] provides in part: "Except as provided in section 12, the Secretary of Labor shall bring all actions under section 17 to restrain violations of this Act." In so far as plaintiff's prayer relates to action by the Secretary to restrain violations, the answer is that the appeal is to his discretion, as the quoted provision of the statute makes clear. In so far as she prayed that the Secretary be required to investigate, the answer is undisputed that such an investigation was made. In so far as The Washington Post Company is concerned, the Fair Labor Standards Act makes no provision for a civil action by an employee to recover damages for discharge in violation of the Act

[1] 52 STAT. 1068 (1938), 29 U.S.C.A. § 215(a)(3).

[2] 52 STAT. 1066 (1938) as amended, 29 U.S.C.A. § 211(a).

on for reinstatement. The statute does provide[3] that employees may recover in a civil action unpaid minimum wages or unpaid overtime compensation, plus an additional equal amount as liquidated damages. But our appellant did not claim unpaid minimum wages or unpaid overtime compensation.

The judgment of the District Court must be and is affirmed.[4]

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,823

SEPTEMBER TERM, 1958

C. A. 1351-58

DIANA K. POWELL, APPELLANT,

v.

THE WASHINGTON POST COMPANY and JAMES P. MITCHELL, Secretary of Labor, APPELLEES.

Appeal from the United States District Court for the District of Columbia

Before: PRETTYMAN, Chief Judge, and FAHY and BURGER, Circuit Judges.

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

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[3] 52 STAT. 1069 (1938), as amended, 29 U.S.C.A. § 216(b).

[4] *Compare* Bowe v. Judson C. Burns, 137 F.2d 37 (3d Cir. 1943); Roberg v. Henry Phipps Estate, 156 F.2d 958 (2d Cir. 1946).

On Consideration Whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further Ordered by the Court that appellee The Washington Post Company recover from appellant its taxable costs on this appeal and have execution therefor.

Per Curiam.

Dated: April 23, 1959

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 937

DIANA K. POWELL, *Petitioner*,

v.

THE WASHINGTON POST COMPANY,

AND

JAMES P. MITCHELL, Secretary of Labor for the United States of America, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT THE WASHINGTON POST COMPANY IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is reported at 168 F.Supp. 41. The opinion of the Court of Appeals is unofficially reported at 37 CCH Lab. Cas. para. 65, 384 and at 14 W.H. Cas. 140.

STATUTES AND RULES INVOLVED

Statutes

Fair Labor Standards Act of June 25, 1938, c. 676, § 11(a), 52 Stat. 1066, as amended, 29 U.S.C. § 211(a) (1952):

> "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Secretary of Labor shall bring all actions under section 17 to restrain violations of this Act."

Fair Labor Standards Act of June 25, 1938, c. 676, § 15(a), 52 Stat. 1068, as amended, 29 U.S.C. § 215(a) (1952):

> ". . . It shall be unlawful for any person—
>
> * * *
>
> "(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee; . . ."

Fair Labor Standards Act of June 25, 1938, c. 676, § 16, 52 Stat. 1069, as amended, 29 U.S.C. § 216 (1952):

"(a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. ...

"(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. ...

"(c) The Secretary of Labor is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or section 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. When a written request is filed by any employee with the Secretary of Labor claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act, the Secretary of Labor may bring an action in any court of compe-

tent jurisdiction to recover the amount of such claim. . . ."

Fair Labor Standards Act of June 25, 1938, c. 676, § 17, 52 Stat. 1069, as amended, 29 U.S.C. § 217 (Supp. V, 1958):

> "The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

Federal Rules of Civil Procedure

Rule 19(a):

> "(a) NECESSARY JOINDER. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff."

QUESTIONS PRESENTED

(1) Did the court below properly conclude that the Fair Labor Standards Act makes no provision for a civil action by an employee for reinstatement after discharge in alleged violation of Section 15(a)(3) of the Act?

(2) Where the Secretary of Labor investigated an employee's complaint that she was discharged from her employment in violation of Section 15(a)(3) of the

Act and declined to bring an action against the employer for reinstatement of such employee, did the court below properly conclude that the employee's appeal was to the discretion of the Secretary of Labor and that he could not be involuntarily joined as a party plaintiff and required to bring this action?

(3) Should this court review a unanimous ruling by the United States Court of Appeals for the District of Columbia Circuit which is:

(a) clearly correct;

(b) admitted by Petitioner to be consistent with decisions of the Second and Third Circuits;

(c) not claimed by Petitioner to be in conflict with any decision of this Court or of any circuit court;

(d) and supported by a clear expression of the intent of Congress;

upon Petitioner's contention that the circuit courts, including the court below, have misinterpreted the language of the Fair Labor Standards Act?

COUNTERSTATEMENT OF THE CASE

Petitioner, Diana K. Powell, on May 26, 1958, filed a complaint in the United States District Court for the District of Columbia against The Washington Post Company and James P. Mitchell, Secretary of Labor for the United States of America.

The complaint is set forth at pages 2-4 of the Joint Appendix as printed for the use of the court below. In substance, it alleges that Petitioner was employed as a part-time clerk by The Washington Post Company from April 24, 1954 to April 25, 1958; that on or about

February 21, 1958, and at times thereafter, she called to the attention of officers of The Washington Post Company the fact that, in her opinion, certain clerks (other than herself) were working in excess of forty hours a week without receiving compensation for overtime in violation of Section 7 of the Fair Labor Standards Act, 29 U.S.C. § 207, and that true records of the hours worked by such clerks were not being kept by The Washington Post Company as required by Section 11(c) of the Act, 29 U.S.C. § 211(c); that thereafter The Washington Post Company discriminated against her and, "upon being informed of her intent to submit the controversy to the Department of Labor, discharged her on April 25, 1958, in violation of Section 15(a)(3) of said Act"; and that Petitioner requested investigation of these matters by the Department of Labor by letter dated April 30, 1958. Petitioner in her complaint demanded that The Washington Post Company be required to reinstate her "in adequate and suitable employment" and to pay her "such compensation for time unemployed as the Court may deem just."

On June 16, 1958, The Washington Post Company moved to dismiss the action against it on the ground that the Court lacked jurisdiction under the Fair Labor Standards Act of 1938, as amended, and because the complaint failed to state a claim against it upon which relief could be granted. (J.A. 4-5). The District Court heard oral argument on this motion, and, on October 1, 1958, filed a Memorandum Opinion. (J.A. 15-17; App. 1a-2a). On October 21, 1958, the District Court entered an order granting the motion (J.A. 17-18; App. 3a), from which order this appeal was taken to the United States Court of Appeals for the District of Columbia Circuit. (J.A. 19).

On August 4, 1958, Petitioner moved to join James P. Mitchell, Secretary of Labor, as an involuntary plaintiff under Rule 19(a) of the Federal Rules of Civil Procedure, to require the Secretary to bring an action for her reinstatement against The Washington Post Company, and for judgment on the pleadings. (J.A. 9-11). This motion, opposed by The Washington Post Company (J.A. 11) and by James P. Mitchell, Secretary of Labor, was denied by the District Court in its order filed on October 21, 1958. (J.A. 17-18).

Respondent James P. Mitchell, Secretary of Labor, filed a motion for summary judgment on August 29, 1958 (J.A. 11-12), attaching to his motion as Exhibit A an affidavit of Charles A. Hennessey, Administrator's Field Representative, in which Mr. Hennessey stated that he made an investigation of the operations of The Washington Post Company on June 27, 1958, and "was unable to obtain or find any evidence that the Company had violated any of the provisions of the Fair Labor Standards Act with respect to Diana K. Powell during the period of her employment there as a part-time employee who worked but a few hours per day" and that "it appeared from the data secured that Diana K. Powell's employment terminated with the abolition of her job. . . ." (J.A. 12-13). Miss Powell filed an affidavit in which she admitted that this investigation was made. (J.A. 13-15). The District Court granted summary judgment for the Secretary of Labor in its order filed on October 21, 1958 (J.A. 17-18; App. 3a), from which order this appeal was taken to the United States Court of Appeals for the District of Columbia Circuit. (J.A. 19).

Petitioner's appeal was heard by the United States Court of Appeals for the District of Columbia Circuit

(Chief Judge Prettyman, Judges Fahy and Burger) which on April 23, 1959, affirmed, *per curiam*, the judgment of the District Court. (App. 4a-7a). Referring to that part of the judgment of the District Court granting summary judgment for the Secretary of Labor, the Court of Appeals stated in its opinion:

> "Section 11(a) of the Fair Labor Standards Act provides in part: 'Except as provided in section 12, the Secretary of Labor shall bring all actions under section 17 to restrain violations of this Act.' In so far as plaintiff's prayer relates to action by the Secretary to restrain violations, the answer is that the appeal is to his discretion, as the quoted provision of the statute makes clear. In so far as she prayed that the Secretary be required to investigate, the answer is undisputed that such an investigation was made." (App. 5a).

Referring to that part of the judgment of the District Court granting the motion to dismiss filed by Respondent The Washington Post Company, the Court of Appeals stated in its opinion:

> "In so far as The Washington Post Company is concerned, the Fair Labor Standards Act makes no provision for a civil action by an employee to recover damages for discharge in violation of the Act or for reinstatement. The statute does provide that employees may recover in a civil action unpaid minimum wages or unpaid overtime compensation, plus an additional equal amount as liquidated damages. But our appellant did not claim unpaid minimum wages or unpaid overtime compensation." (App. 5a-6a).

REASONS FOR OPPOSING THE GRANT OF THE WRIT

I.

THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT HAD NO JURISDICTION OVER THIS ACTION WHICH PETITIONER BROUGHT UNDER THE FAIR LABOR STANDARDS ACT AGAINST RESPONDENT THE WASHINGTON POST COMPANY FOR REINSTATEMENT.

A. Congress, in providing means for the enforcement of the Fair Labor Standards Act, gave the Secretary of Labor exclusive authority to bring all actions for reinstatement of employees allegedly discharged or in other manner discriminated against in violation of section 15(a)(3) of the Act.

This Court recently had occasion to distinguish between the different means that Congress has provided for the enforcement of the Fair Labor Standards Act:

> "The Act sets up four means for enforcement. Section 16(a), 29 U.S.C. § 216(a), provides for criminal prosecution of willful violators. Section 16(b), 29 U.S.C. § 216(b), gives individual employees rights of actions in civil suits to recover unpaid minimum wages, overtime compensation and certain liquidated damages. Section 16(c), 29 U.S.C. § 216(c), allows the Secretary of Labor to bring such an action in behalf of such employees provided the suit does not involve 'an issue of law which has not been settled finally by the courts.' Section 17, 29 U.S.C. § 217, of course, provides for injunctions." *Mitchell* v. *Lublin, McGaughy & Associates*, 358 U.S. 207, 214 (1959).

Petitioner does not allege that she was not paid the minimum wage or overtime compensation. She alleges that she was discharged because she threatened to complain to the Secretary of Labor that other employees were not paid overtime compensation and that her discharge was therefore in violation of Section 15(a)(3) of the Act, 29 U.S.C. § 215(a)(3). Petitioner sought

in her complaint (J.A. 2-4) an order directing Respondent The Washington Post Company to reinstate her with "such compensation for time unemployed as the Court may deem just."

Petitioner's prayer for reinstatement would require the District Court to issue a mandatory injunction under Section 17 of the Act, 29 U.S.C. § 217, which provides that "the district courts . . . shall have jurisdiction, for cause shown, to restrain violations of Section 15." *Bowe* v. *Judson C. Burns, Inc.*, 137 F.2d 37, 39 (3d Cir. 1943).

However, Section 11(a) of the Act, 29 U.S.C. § 211(a), which authorizes the Administrator to "investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act," provides:

> "Except as provided in section 12 [which relates to child labor], *the Secretary of Labor shall bring all actions under section 17 to restrain violations of this Act.*" (Emphasis added.)

Petitioner contends that this does not mean that the Secretary of Labor shall bring all actions under Section 17 to restrain violations of Section 15(a)(3) of the Act because, in her opinion, such an interpretation would be inconsistent with "the protection of the rights of employees." (Pet. 7). To support her theory she cites at pages 7-8 of her Petition a statement made by Wage and Hour Administrator William R. McComb before the House Committee on Education and Labor, found in *Hearings Before the House Committee on Education and Labor*, 81st Cong., 1st Sess. pt. 1, at 114 (1949). She has tailored Mr. McComb's statement so

as to make it appear that an employer who violates any provision of the Fair Labor Standards Act can be sued either by the employee affected or by the Secretary of Labor at his or her request. Actually, the statement refers only to Section 16(c) of the Act, 29 U.S.C. § 216(c), which allows (but does not require) the Secretary of Labor to bring a civil action to recover unpaid minimum wages or overtime compensation for an employee who is reluctant to bring the action himself under Section 16(b), 29 U.S.C. § 216(b).

Petitioner fails to grasp the distinction between an action for unpaid minimum wages and overtime compensation, which may be brought either by the employee under Section 16(b), 29 U.S.C. § 216(b), or by the Secretary of Labor under Section 16(c), 29 U.S.C. § 216(c), and an action to enjoin a violation of Section 15, 29 U.S.C. § 215. When Senate and House conferees favorably reported the Fair Labor Standards Act on June 11, 1938, they made it clear that actions to enjoin violations of Section 15 differed from actions under Section 16 and were to be brought only by the Secretary of Labor:

> "Section 11 of the conference agreement provides for investigations, inspections, and records. Its provisions do not substantially depart from the corresponding provisions of the House amendment except that 'Administrator' is substituted for the 'Secretary of Labor.' The Administrator is directed to utilize the divisions and bureaus of the Department of Labor, of which the Wage and Hour Division itself is a part, for investigations, the gathering of data, and inspections necessary under the Act. *The Administrator, except in connection with the child labor provisions, is given power to bring all actions to enjoin violations of section 15.*" (Emphasis added.)

See *H.R. Rep.* No. 2738, 75th Cong. 3rd Sess. (1938), at page 32.

The intent of Congress is perfectly clear. If investigation by the Administrator (or by his designated representatives) pursuant to Section 11(a) of the Act discloses a violation of Section 15, the Secretary is empowered to bring an action in his official capacity[1] for injunctive relief.[2] This right of action is exclusive in the Secretary.

The precise question presented by Petitioner has been decided by the United States Courts of Appeals for the Second and Third Circuits. In *Bowe* v. *Judson C. Burns, Inc.*, 137 F.2d 37 (3d Cir. 1943), the plaintiffs had sued their employer under Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), to recover unpaid overtime compensation. One month after bringing this action the plaintiffs brought a second action, alleging that their employer had threatened them with discharge and their union had threatened them with expulsion if they did not

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[1] The authority of the Administrator was transferred to the Secretary of Labor on May 24, 1950, under Reorganization Plan No. 6.

[2] Thus, in Mitchell v. Equitable Beneficial Life, Health & Accident Co., 13 W.H. Cas. 564, 606 (D. N.J. 1958), cited by Petitioner at pages 9-10 of her Petition, the court recited in its Conclusions of Law at 13 W.H. Cas. 607:

> "Pursuant to section 17 of the Fair Labor Standards Act, the court has jurisdiction of this action, *brought by the Secretary of Labor* for violation of section 15(a)(3) of that Act.
>
> • • •
>
> "*The Secretary of Labor*, in instituting an action under section 15(a)(3) of the Fair Labor Standards Act, is entitled to injunctive relief and, as ancillary to such relief, he may demand reinstatement of the employee discharged. . . ." (Emphasis added.)

abandon their action under Section 16(b) of the Act. When they refused they were discharged by their employer and expelled by their union. The plaintiffs asked the court to restrain their employer from discharging or otherwise discriminating against them. Since Section 15(a)(3) of the Act, 29 U.S.C. § 215(a)(3), provides that it shall be unlawful for "any person" to discriminate against any employee because the employee has instituted any proceeding under the Act, the plaintiffs also asked the court to order their reinstatement as members in good standing of the union. The Court of Appeals for the Third Circuit held at 137 F.2d 39 that the complaint was properly dismissed as to both the employer and the union:

> "Section 17, 29 U.S.C.A. § 217, gives jurisdiction to the district courts of the United States of suits to restrain violations of the provisions of Section 15 of the Act, but Section 11(a), 29 U.S.C.A. § 211(a), states 'Except as provided in Section 12 of this Act (relating to child labor), the Administrator shall bring all actions under section 17 * * * to restrain violations of sections 1-15 * * *.' *We think it is plain from this language that the right of the administrator to bring an action for injunctive relief is an exclusive right.* Employee actions may be maintained only under Section 16(b) to recover back wages and liquidated damages. We conclude therefore that the court below may not restrain the defendants as sought by the plaintiffs.
>
> "The plaintiffs pray that they may be reinstated as members of the union in good standing. This is the obverse of the prohibition of discharge or discrimination embodied in Section 15(a)(3) of the Act. To grant this prayer of the plaintiffs would require the court below to issue a mandatory injunction. In view of the provision of Section 11(a) which we have referred to we think that

> the court below may not order the union to reinstate the plaintiffs. *Such relief would be substantially the equivalent of relief based on Section 15(a)(3) to be given by a district court on the application of the administrator under Section 11(a).* Since jurisdiction in the case at bar is based solely on the provisions of Section 17 of the Act, it follows that the order of the court below must be affirmed. . . ." (Emphasis added.)

Considering the claim by an employee that he was discharged because he joined in a suit to recover overtime compensation from his employer, and that his discharge was therefore in violation of Section 15(a)(3) of the Fair Labor Standards Act, the United States Court of Appeals for the Second Circuit held in *Roberg v. Henry Phipps Estate*, 156 F.2d 958 (2d Cir. 1946), that the employee's demand for an injunction against this allegedly discriminatory discharge was properly dismissed by the trial court. The court stated at 156 F.2d 963:

> "The trial court correctly dismissed the prayer for injunction against discriminatory practice by one of the plaintiffs on the ground that the Administrator has exclusive authority to bring such an action. Section 17 of the Act, 29 U.S.C.A. § 217, gives the district court jurisdiction to restrain unfair employment practices which violate § 15(a) of the Act, 29 U.S.C.A. § 215(a); but § 11(a) explicitly vests the right of action for injunction in the Administrator alone. *Bowe v. Judson C. Burns, Inc.*, 3 Cir., 137 F.2d 37."

Petitioner condemns but does not attempt to distinguish these cases. (Pet. 8).

While Petitioner did not contend in the court below and does not now contend that the ruling of the District Court that "the Fair Labor Standards Act makes

no provision for a civil action by an employee allegedly discriminately discharged in violation of Section 15(a)(3) of the Act to recover damages for such discharge" (App. 2a) was erroneous, the Court of Appeals for the District of Columbia Circuit specifically affirmed this ruling. (App. 5a). It may be noted that the Court of Appeals for the Second Circuit has also held in a suit brought by a discharged employee that the Fair Labor Standards Act "confers no jurisdiction upon the court over a civil action to recover damages for the discharge of an employee in violation of the statute." *Bonner* v. *Elizabeth Arden, Inc.*, 177 F.2d 703, 704-705 (2d Cir. 1949).

On the basis of the foregoing, it is clear that the District Court had no jurisdiction over Petitioner's action for reinstatement and for damages. Accordingly, the complaint was properly dismissed.

B. SINCE THE SECRETARY OF LABOR INVESTIGATED PETITIONER'S COMPLAINT THAT SHE WAS DISCHARGED FROM HER EMPLOYMENT IN VIOLATION OF SECTION 15(a)(3) OF THE FAIR LABOR STANDARDS ACT, IT CANNOT BE SAID THAT HIS DECISION NOT TO BRING AN ACTION FOR HER REINSTATEMENT WAS AN ABUSE OF DISCRETION. THE SECRETARY COULD NOT BE INVOLUNTARILY JOINED AS A PARTY PLAINTIFF AND REQUIRED TO BRING THIS ACTION.

1. THE DECISION NOT TO BRING AN ACTION FOR PETITIONER'S REINSTATEMENT WAS WITHIN THE DISCRETION OF THE SECRETARY OF LABOR.

Petitioner contends that the Secretary's refusal to bring an action against Respondent The Washington Post Company for her reinstatement was an "arbitrary and capricious evasion of duty . . ." (Pet. 3). The question of whether the Department of Labor must make an investigation upon receipt of a complaint[3] is

[3] Section 11(a), 29 U.S.C. § 211(a), provides that the Administrator "*may* . . . investigate such facts, conditions, practices, or matters as he *may* deem necessary or appropriate to determine whether any person has violated any provision of this Act. . . ." (Emphasis added.)

not presented here because Petitioner admits at page 11 of her Petition that "the affidavit of Mr. Hennessey, the investigator (J.A. 12) shows . . . that he investigated [alleged] wage and hour violations [of Respondent The Washington Post Company] as to the Petitioner . . . ." The court below observed that an affidavit which Petitioner filed in the District Court (J.A. 13-15) "verified the fact that such an investigation had been made." (App. 5a). Since there is nothing in the Fair Labor Standards Act, in its legislative history, in the decisions of the courts or in reason to require the Secretary of Labor to bring an action against an employer "whenever an allegation of violation is received by the Department" (App. 2a), summary judgment for the Secretary was proper.[4]

2. RULE (19a) OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT ENABLE PETITIONER TO DO INDIRECTLY WHAT SHE CANNOT DO DIRECTLY.

The purpose of Rule 19(a) of the Federal Rules of Civil Procedure is not to enable one who does not have a cause of action to bring an action by simply joining another who does have a cause of action. Rule 19(a) "presupposes that the complainant has a standing and cause of action *in his own right and name*, for the determination of which such [other] persons are necessary or indispensable parties." *Coast v. Hunt Oil Co.*, 96 F. Supp. 53, 60 (W.D. La. 1951), *aff'd*, 195 F.2d 870 (5th Cir.), *cert. denied*, 344 U.S. 836 (1952).

In that case, Coast, the plaintiff, owned a forty-nine percent interest in a partnership. His partner, one Querbes, the owner of the remaining fifty-one percent

[4] Doubtless the question of the Secretary's discretion will be discussed fully in the brief of Respondent James P. Mitchell, Secretary of Labor.

interest, refused either to join in or to permit the use of the firm name as plaintiff in a suit initiated by Coast against two competing oil companies for violation of the antitrust laws. The defendants moved to dismiss for failure to state a cause of action upon which relief could be granted. Under Louisiana law an action on a partnership claim cannot be brought by a partner but only by the partnership in its own name through all partners. *Coast* v. *Hunt Oil Co., supra*, at 96 F. Supp. 59. It is "a fictitious being, distinct from the partners composing it," and a distinct legal entity. *Coast* v. *Hunt Oil Co., supra*, at 195 F.2d 871. Since the plaintiff had no standing to bring the action in his own right and name, 96 F. Supp. at 60, the District Court for the Western District of Louisiana granted the defendants' motion to dismiss. Affirming the dismissal of the action, the Court of Appeals for the Fifth Circuit disposed of the interpretation of Rule 19(a) of the Federal Rules of Civil Procedure advanced by Petitioner in the instant case:

> "Appellant insists however that under Rule 19(a), Fed. Rules Civ. Proc., 28 U.S.C.A., he has the right to make the partnership an involuntary plaintiff or to make Querbes a party defendant for the purpose of causing the action to be maintained by the partnership. The difficulty is that the plaintiff himself has no standing, joint or otherwise, to maintain this action. Rule 19(a), supra, relates to joinder of parties, it permits a plaintiff under proper circumstances to require another person or persons to join with him, *but it makes no provision for a plaintiff to require another person to maintain an action vested solely in such other person, even though its maintenance might result in benefit to the plaintiff.* In speaking of the application of this rule as to joinder of

> a party as 'involuntary plaintiff', Professor Moore says, 'The doctrine can properly be applied only where there is such a relationship that the absent party must allow the use of his name as plaintiff', 3 Moore's Federal Practice (2nd ed.) page 2149. We think the rulings of the district court were correct, and its judgment is therefore affirmed." (195 F.2d at 872) (Emphasis added.)

In the instant case, it is clear that Petitioner had no standing to bring an action under the Fair Labor Standards Act for reinstatement. The cause of action is vested exclusively in the Secretary of Labor. 29 U.S.C. §§ 211(a), 215(a)(3), 217; *Roberg* v. *Henry Phipps Estate, supra; Bowe* v. *Judson C. Burns, Inc., supra.* Nor had Petitioner standing to bring an action under the Fair Labor Standards Act for damages. *Bonner* v. *Elizabeth Arden, Inc., supra.* Under Rule 19(a) of the Federal Rules of Civil Procedure, the Secretary of Labor cannot be required to maintain an action vested solely in him, "even though its maintenance might result in benefit to the plaintiff." *Coast* v. *Hunt Oil Co., supra,* at 195 F.2d 872.

II.

THE QUESTIONS RAISED IN THE PETITION ARE NOT OF THE CHARACTER SPECIFIED BY RULE 19 OF THE RULES OF THIS COURT AS APPROPRIATE FOR REVIEW HERE ON WRIT OF CERTIORARI.

The decision of the court below interprets the Fair Labor Standards Act in accordance with the plain meaning of its language, with the expressed intent of Congress and with the applicable decisions of other circuits. Moreover, the decision of the court below is consistent with the decisions of this Court. Thus, there are

not only no "special and important reasons" for reviewing the decision of the court below on writ of certiorari (see Rule 19(1) of the Rules of this Court), but there are no reasons at all for such review.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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June 18, 1959

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JAMES R. BROWNING

No. 937

In the Supreme Court of the United States

OCTOBER TERM, 1958

DIANA K. POWELL, PETITIONER

v.

THE WASHINGTON POST COMPANY, AND JAMES P. MITCHELL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (Pet. App. 1a–2a) is reported at 168 F. Supp 41. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 4a–6a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 4a–7a) was entered on April 23, 1959. The petition for a writ of certiorari was filed on May 22, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does an action in the nature of mandamus lie to compel the Secretary of Labor to prosecute an injunction proceeding against an employer under Section 17 of the Fair Labor Standards Act?

STATUTE INVOLVED

The pertinent portions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, are set forth in the Appendix, *infra*, pp. 12–13.

STATEMENT

Petitioner, a former part-time clerk for the Washington Post Company, brought this civil action against her former employer and James P. Mitchell, Secretary of Labor, to obtain reinstatement with the Company and back pay which she claims under the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, Appendix, *infra*, pp. 12–13.

On April 25, 1958, petitioner was dismissed by the Washington Post Company (R. 3). By letter dated April 30, 1958, she requested the Wage and Hour Division of the Department of Labor to investigate her charge that clerks employed by the Washington Post Company (other than herself) were working in excess of 40 hours a week without receiving overtime pay, that true records of the actual hours worked were not being maintained, and that she had been discharged by the Washington Post Company because of her intent to submit her protests to the Secretary of Labor (R. 3). Three weeks after this letter, she filed the instant action against the Washington Post Company

and James P. Mitchell, as co-defendants, demanding reinstatement and back pay, and praying that the Secretary of Labor investigate her charges and "take such further action as may be necessary to restrain continued violations of Section 7, Section 11(c) and Section 15(a) by defendant Washington Post Company, or may in his discretion appear just" (R. 4).

Approximately eight weeks after petitioner's letter to the Department of Labor, a field representative of the Wage and Hour Division investigated the operations of the Washington Post Company. After a two-hour conference with petitioner (R. 13), examination of the Company's records, and contacts with its employees and officials, the field representative concluded that he "was unable to obtain or find any evidence that the company had violated any of the provisions of the Fair Labor Standards Act with respect to Diana K. Powell during the period of her employment there as a part-time employee who worked but a few hours a day. It appeared from the data secured that Diana K. Powell's employment terminated with the abolition of her job by the aforementioned company and, further, that this abolition has continued until the present time" (R. 12).

The defendant Washington Post Company, in the meantime, had filed a motion to dismiss petitioner's complaint against it on the ground that the Fair Labor Standards Act makes no provision for a civil action by an employee allegedly discharged in violation of Section 15(a)(3) to recover damages, and that exclusive authority to bring an action for reinstatement in such circumstances is vested in the Secretary of Labor

(R. 4–5). In response to this motion, petitioner urged that the Washington Post Company's objection had been "cured by joinder of the Secretary of Labor as a party" (R. 6). The Secretary answered petitioner's complaint (R. 8–9), and, thereafter, petitioner filed a motion to join the Secretary, who was already a party defendant, as an involuntary plaintiff under F.R. Civ. P. 19(a) (R. 9).

The Secretary moved on the merits for summary judgment on the ground that there was no genuine issue as to any material fact and that he was entitled to judgment as a matter of law. This motion was supported by the affidavit of Charles A. Hennessey, the field representative of the Wage and Hour Division who had investigated petitioner's charges (R. 10–12). Petitoner filed a counteraffidavit in which she described her interview with Mr. Hennessey (R. 13–14).

On October 1, 1958, the district court granted the motion of the Secretary of Labor for summary judgment, denied petitioner's motion to join him as an involuntary plaintiff, granted the Washington Post Company's motion to dismiss the action as to it for lack of jurisdiction and failure by petitioner to state a claim upon which relief could be granted, and denied petitioner's motions for judgment on the pleadings and summary judgment (R. 15–17). On appeal, the Court of Appeals affirmed.

ARGUMENT

Petitioner's original complaint sought relief in the nature of mandamus to compel the Secretary of Labor to do two things: (1) investigate her charges that

certain employees of the Washington Post Company (other than herself) were working overtime without receiving the extra compensation required by the Fair Labor Standards Act; and (2) investigate her charge that she had been discharged by the Washington Post Company because she threatened to report the aforementioned violation to the Department of Labor. Petitioner has apparently now revised the theory of her case and demands only that the Secretary be realigned from co-defendant with the Washington Post Company to involuntary party plaintiff. As both courts below correctly held, neither theory has merit. There is no conflict with decisions of this Court or other courts of appeals, and further review is unwarranted.

1. Petitioner's charges that the Washington Post Company violated Section 15 of the Fair Labor Standards Act were investigated by the Department of Labor. The record shows that, approximately eight weeks after her letter complaining of violations had been sent to the Department, a field representative of the Wage and Hour Division contacted her and the Washington Post Company and conducted an investigation. This investigation was not confined to petitioner's original charges, but was directed as well to the circumstances surrounding her dismissal from the Washington Post Company. The field representative concluded that the evidence did not show a violation of any of the provisions of the Fair Labor Standards Act in connection with petitioner's discharge.[1] (R. 12,

[1] Although not relevant to the issue presented in this case, it should be noted that the investigation of the petitioner's charges did reveal a question, concerning violations of the Act by the

13). Consequently, no legal action has been initiated by the Secretary against the Washington Post Company in connection with petition's charges or her dismissal.

Petitioner disagrees with the conclusions reached by the field representative and the Secretary. But this disagreement is irrelevant to the question which was before the courts below—whether she was entitled to relief in the nature of mandamus against the Secretary. The Act places squarely within the discretion of the Secretary the key enforcement decisions, *i.e.*, when to investigate and when to take legal action against employers. Section 11(a), 52 Stat. 1066, 29 U.S.C. 211(a). The Secretary has exercised his discretion in the matter and it is established that mandamus will not lie to control its exercise. See, *e.g.*, *Marbury* v. *Madison*, 1 Cr. 137, 164; *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316; *Panama Canal Co.* v. *Grace Line*, 356 U.S. 309, 318. This principle is particularly applicable to attempts to compel government officials to prosecute legal actions against other parties. See, *e.g.*, *Jacobsen* v. *N.L.R.B.*, 120 F. 2d 96, 99–100 (C.A. 3); *Crooker* v. *Securities Exchange*, 161 F. 2d 944, 949 (C.A. 1); *Berlinsky* v. *Woods*, 178 F. 2d 265, 267 (C.A. 4), certiorari denied, 339 U.S. 949. Even if it may be concluded that the Secretary's assessment of evidence was erroneous, his decision not to charge the Washington Post Company with violating the Fair Labor Standards Act was not subject to revision through a

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Company in connection with other employees (see R. 14), which was the subject of negotiations between the Company and the Secretary of Labor.

writ of mandamus. *Riverside Oil Co.* v. *Hitchcock, supra.*

2. Seemingly recognizing that mandamus is not available to her against the Secretary, petitioner seeks to accomplish indirectly what she cannot do directly. Since the Secretary has concluded that the facts do not warrant an action for an injunction to restrain the violations of Section 15 with which the Washington Post Company is charged, she has initiated such an action in her own name and seeks to join the Secretary as an involuntary party plaintiff, *i.e.*, "as a necessary and interested, but inactive party" (Pet. 14). This interpretation of Rule 19(a) of the Federal Rules of Civil Procedure, which authorizes involuntary joinder in certain circumstances, is unfounded. It violates both the spirit of the Rules and the remedial scheme established by Congress for the enforcement of the Act.

The Fair Labor Standards Act establishes fixed economic standards for minimum wages, maximum hours and overtime, and prohibits the employment of oppressive child labor, Sections 6, 7, 12, 52 Stat. 1062, 1063, 1067, 29 U.S.C. 206, 207, 212. These provisions are implemented by Section 15 which prohibits interstate shipment of goods produced in violation of the wage and hours provisions (15(a)(1)), and further prohibits discharge of or discrimination against employees assisting in the enforcement of the Act (15(a)(3)).

Although the provisions of Section 15 make certain enumerated acts unlawful, this does not, of itself, create private statutory rights. To determine the ex-

tent of private rights under the Act, the entire remedial scheme provided therein must be considered. Cf. *Montana-Dakota Public Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246.

This scheme consists of a carefully balanced pattern of public and private remedies. See *Mitchell* v. *Lublin*, 358 U.S. 207, 214. Thus, employees are given a private cause of action at law to recover unpaid minimum wages or overtime pay plus liquidated damages. Section 16(b), 52 Stat. 1069, 29 U.S.C. 216(b), but this private right is not exclusively within the control of the employee. Since it is intended to effectuate the legislative policy of the Act, the employee cannot contract away his right to minimum wages. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697. And since 1947, the Secretary of Labor has been authorized to bring such actions, with their consent, on behalf of the employees involved. Section 16(c), 61 Stat. 87, 29 U.S.C. 216(c). But the Act does not provide for an action at law by the employee to recover damages (*i.e.*, loss of wages) for discriminatory discharge in violation of Section 15(a)(3). *Bonner* v. *Elizabeth Arden, Inc.*, 177 F. 2d 703 (C.A. 2). Enforcement of statutory sanctions against discriminatory discharge and other violations of the Act are entrusted to the discretion of the Secretary.

Willful violations of Section 15 may be prosecuted criminally in the name of the United States, Section 16, 52 Stat. 1069, 29 U.S.C. 216, or, willful or not, be restrained by a suit in equity, Section 17, 52 Stat. 1069, 29 U.S.C. 217. However, no private suit in equity has been established, for Section 11(a) provides

that "the [Secretary of Labor] shall bring all actions under [Section 17] to restrain violations of [the Act]," Section 11(a), 52 Stat. 1066, 29 U.S.C. 211(a), and this remedy is exclusive. *Bowe, et al.* v. *Burns*, 137 F. 2d 37 (C.A. 3); *Roberg* v. *Henry Phipps Estate*, 156 F. 2d 958 (C.A. 2).[2]

In the light of the Act's remedial scheme, it is plain that petitioner cannot by a suit in equity for injunctive relief compel her reinstatement on account of alleged discrimination against her in violation of Section 15(a)(3). Like the other provisions of Section 15, it may be enforced only by the Secretary acting as a public agent. Cf. *Amalgamated Workers* v. *Edison Co.*, 309 U.S. 261.

The congressional purpose in making the Secretary the exclusive agent for enforcement of Section 15 through action in equity is readily understandable. In accordance with the congressional policy of limiting the availability of injunctive remedies in the area of labor relations (cf. 47 Stat. 70, 29 U.S.C 101, *et seq.*), the injunctive remedies contemplated by Section 17 have not been made available to private persons prosecuting private complaints but, instead, have been restricted to a public official, the Secretary, whose only concern is to carry out the mandate of Congress.

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[2] On April 20, 1959, this Court granted certiorari in *Mitchell* v. *De Mario Jewelry, Inc.*, [illegible], 260 F. 2d 929 (C.A. 5), certiorari granted, 359 U.S. 964, [illegible] the scope of the equitable remedy under Section 17 [illegible]. The question there presented on suit by the Secretary of Labor is: Whether the district courts have power, ancillary to the authority "to restrain

It follows from the discussion above that petitioner cannot acquire standing in equity by the procedural maneuver of forcing the Secretary to become an involuntary plaintiff under F.R. Civ. P., 19(a), for the Rule "presupposes that the complainant has a standing and cause of action in his own right and name * * *". *Coast* v. *Hunt Oil Co.*, 96 F. Supp. 53, 60 (W.D. La.), affirmed, 195 F. 2d 870 (C.A. 5), certiorari denied, 344 U.S. 836.

Under petitioner's interpretation, Rule 19(a) converts every civil action exclusively entrusted to public officials into a proceeding in the nature of a *qui tam* action which may be prosecuted by private persons without enforceable rights of their own, simply by a nominal joinder of the interested officer as involuntary plaintiff. The Rule, however, does not lend itself to such interpretation. It does not enlarge petitioner's substantive rights or modify substantive doctrines of standing. 28 U.S.C. 2072. Nor may it serve as a substitute for relief, which is not otherwise available, to compel the Secretary to prosecute an action which, in his discretion, he has declined to undertake.

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* * * violations", to order reimbursement for loss of wages resulting from the discriminatory damage of employees in violation of the Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

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JUNE 1959.

APPENDIX

The Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, provides in pertinent part as follows:

Section 11(a) (29 U.S.C. 211(a)):

> The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the [Secretary of Labor] shall bring all actions under section 217 of this title to restrain violations of this chapter.

* * * * *

Section 15(a)(3) (29 U.S.C. 215(a)(3)):

> After the expiration of one hundred and twenty days from [June 25, 1938], it shall be unlawful for any person—

* * * * *

> (3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted

or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

* * * * *

Section 17 (29 U.S.C. 217):

The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title: *Provided,* That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

U S GOVERNMENT PRINTING OFFICE: 1938